United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7495

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FOR THE SECOND CIRCUIT

COSMO RUGGIERO,

Plaintiff-Appellee,

—against—

KONINKLIJKE NEDERLANDSCHE STOOMBOOT MAATSCHAPPIJ, N.V.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Issues

1. Was there sufficient evidence of defendant-appellant's notice to allow plaintiff-appellee's negligence claim to be submitted for jury determination?

2. Singly or cumulatively, do any erroneous rulings, charge, refusals to charge, or any judicial misconduct warrant a new trial?

Statement

Appellee longshoreman, claiming he slipped on oil or grease, sued appellant shipowner for 1970 arm injury while stowing cars. Trial was before Duffy, J. and a jury, without opinion.

Plaintiff's witness, the stevedore's signal man (T1-3),* testified that after brought aboard and before lowered into the hatch, the cars were briefly left on the main deck (T6-7), each time in the same place (9a). After several cars had been loaded, and after seeing plaintiff slip in the hatch (9a), the signal man saw spots of oil or grease on the main deck where the cars had been landed, and asked the ship's mate to do something about the spots (8a, 9a).

Plaintiff testified that after he and other longshoremen pushed a car out of the hatch square (T28-29, 48-49, 51), they took hold of the bumper to bounce the car into a space, and while doing so plaintiff slipped on grease or oil (10a, T52) which he first saw, after he slipped (11a), on his shoe after walking around (10a, 12a). None of the other longshoremen slipped, nor did plaintiff do so again (12a).

Plaintiff's injury occurred about 9:45 A.M. (T48). He continued working until 5 P.M. (12a) and reported the accident the following Monday to the stevedore's timekeeper, whom plaintiff claims to have told he slipped on grease or oil (T59), and to the treating physician, whom plaintiff told how he hurt his arm (T37-39). Exhibit A, the timekeeper's report (15a-16a) which, contrary to the time-

* T references are to "EOd" pages of the transcript.

keeper's procedure (T113-114) and testimony (T115), plaintiff claims was blank when he signed it (T60), reads:

> "Describe accident fully: While stowing a car in place I was picking up the rear of the car to bounce it into place when I felt a pain in the left forearm." (16a)

Exhibit B, the attending physician's report (14a), reads:

> "Employee's account of how injury or exposure to occupational disease occurred. * * * While pushing vehicle into place, felt a sharp pain in left shoulder and entire arm." (14a-15a)

The treating physician declared plaintiff fit to resume work 2 months afterwards (T63), but plaintiff did not work for 11 weeks (T41). Plaintiff's non-treating medical witness, who first examined a week before trial so he could testify (13a), and who assumed that the worse he found plaintiff, the more plaintiff would likely receive (T94-95), was given:

> "* * * a history of having sustained injury to the left shoulder and left arm on April 17, 1970, while helping to push a car on the ship he slipped on oil or greasy substance on board floor and fell, striking the left arm and shoulder." (13a-14a),

which the witness conceded was not the history given the treating physician (15a). Based on the history he got and numerous subjective complaints (T93-94), some of which "could be faked" (T85), plaintiff's medical witness opined that plaintiff had a causally related 20% permanent disability of the arm (T87).

Defendant's directed verdict motions to dismiss plaintiff's negligence claim for insufficient proof of notice, and unseaworthiness claim for insufficient proof of condition, were denied (16a-17a). After purporting to itemize plaintiff's damages, including 11 weeks lost earnings (T156), and $1,000 per % for 20% permanent arm disability (T158), plaintiff's counsel concluded his summation by asking the jury for a "grand total" of $31,063 (T158), exactly what the jury awarded (34a). Defendant's motions for judgment n.o.v. or a new trial, made on the same grounds as this appeal (38a-40a), were denied (40a).

Argument

I

Judicial Misconduct

This issue necessitates close scrutiny of the record, *Anderson* v. *Great Lakes Dredge & Dock Co.*, 509 F.2d 1119, 1131-1132 (2 Cir. 1974). The jury *voir dire* must be read to be believed (2a-7a, TT3-32).* Particularly galling was elicitation that defense counsel did not know the location of Wappinger Falls. When he sought to escape the false affirmative/offending negative dilemma by looking at his papers, the Judge remarked that plaintiff's counsel was nodding yes, and asked the juror to tell "the other one * * * so they both know where it is" (5a).

By folksy questioning, prolonged and confirmed by post-selection by-play (7a-8a), the Judge *affirmatively* established such rapport with the jurors that their natural defer-

* TT references are to "eolt" pages of the transcript.

ence and his consequent influence, coupled with his repeatedly apparent animosity for defense counsel,[1] inevitably inured to the prejudicial detriment of defendant.

The most damaging instance of judicial enmity occurred during summation, when defendant's counsel objected to plaintiff's reading self-serving deposition testimony not in evidence (T149-150),[2] and was curtly overruled on the eye-for-eye sophistry that: "There was no evidence when you read it either, that I remember" (T149). The Judge was also factually wrong. During summation, defense counsel read lines 20-22 on page 36 of plaintiff's filed deposition transcript (T136), also read during plaintiff's cross-examination (11a-12a).

The jurors' improperly induced subservient esteem for the Judge was epitomized by their initial verdict of liability without awarding damages because "we have to

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[1] It started as soon as the first witness was sworn. Defense counsel thought the witness had not responded to the oath but, to be tactful, said he had not heard any response, to which the Judge snapped: "I did. You ought to come closer", an obvious physical impossibility. (T1)

[2] It was, of course, a "particularly indefensible tactic", *Edwards* v. *Sears, Roebuck & Co.*, 512 F.2d 276, 284 (5 Cir. 1975), for plaintiff's counsel during summation to read something not in evidence, *Koufakis* v. *Carvel*, 425 F.2d 892, 900-901 (2 Cir. 1970), especially his client's self-serving deposition testimony, and even an *appropriate* judicial admonition might not have sufficiently eradicated the prejudice to defendant. *Fortunato* v. *Ford Motor Co.*, 464 F.2d 962, 970, 974, 975 (2 Cir. 1972), cert. den. 409 U.S. 1038 (1972). Defense counsel was required to promptly object, *Milesky* v. *Long Island R.R. Co.*, 499 F.2d 1169, 1174 (2 Cir. 1974), which he did (T149), and could also object out of the jury's hearing, *United States* v. *Briggs*, 457 F.2d 908, 912 (2 Cir. 1972), cert. den. 409 U.S. 986 (1972), which he also did (18a). Opposing counsel's prejudicial conduct, exacerbated by judicial error, was a basis for defendant's new trial motion (39a-40a), and for this appeal.

accept the amount you gave us" (34a). Their transmitted antipathy for defense counsel and consequent prejudice against his client was manifested 9 minutes later (39a) by reporting they had a second verdict, "the amount asked for, $31,063" (34a).

It would be presumptuous to cite Judicial Ethics Canons and decisions to buttress this issue. It happened; it prejudiced defendant; and it should be rectified. That either appears from the cold record, or it does not.

II

Insufficient Evidence of Negligence

Plaintiff first noticed grease or oil on his shoe after he slipped in the hatch (10a, 11a, 12a), *cf. Wiseman* v. *Sinclair Refining Co.*, 290 F.2d 818, 820 (2 Cir. 1961), cert. den. 368 U.S. 837 (1961). After plaintiff slipped, the signal man saw grease or oil on the main deck (8a, 9a). There is no evidence of size, visibility, or duration, *cf. Rice* v. *Atlantic Gulf & Pacific Co.*, 484 F.2d 1318, 1320 (2 Cir. 1973), although plaintiff claims "there were drops, a dime, a quarter, half dollar size" (17a) and it might be inferred that any such drops were obscure and transitory. There is no claim of actual notice by defendant, and there is insufficient evidence of constructive notice and consequent negligence liability. *Rice* v. *Atlantic Gulf & Pacific Co., supra,* which affirmed dismissal of negligence claim even assuming accumulation of atomized oil. While it could be urged that there also was insufficient evidence of unseaworthiness, we do not raise that issue here although we intend to do so at any retrial.

There being insufficient evidence of negligence, it was reversible error to submit that claim for jury determination. *Schilling* v. *Delaware & H.R. Corp.*, 114 F.2d 69, 72 (2 Cir. 1940); *Mandel* v. *Pennsylvania Railroad Co.*, 291 F.2d 433, 435 (2 Cir. 1961), cert. den. 368 U.S. 938 (1961). Defendant having separately moved to dismiss the negligence and unseaworthiness claims for insufficiency (16a-17a, 38a), the general verdict for plaintiff must be reversed. *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884); *United Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 618-619 (1959); *Fatovic* v. *Nederlandsch Ameridaansche Stoomvaart*, 275 F.2d 188, 190-191 (2 Cir. 1960); *Mosley* v. *Cia. Mar. Adra, S.A.*, 314 F.2d 223, 226-227 (2 Cir. 1963), cert. den. 375 U.S. 829 (1963).

III

Deficient Charge

Despite protestations when commenting on requests to charge that "I just cannot perhaps at this late stage of my life learn to use other people's words" (T133), the charge is an "aggregate of legal platitudes" recited from pattern jury instructions, with minimum "delineation • • • of the factual issues in the case", *Smith* v. *Texas Co.*, 219 F.2d 74, 75 (2 Cir. 1955). Worse, the Judge refused to charge applicable law.

> "A litigant is entitled to have a trial judge advise the jury of his claims and theories of law if supported by the evidence and brought to the attention of the court." *Oliveras* v. *United States Lines Co.*, 318 F.2d 890, 892 (2 Cir. 1963).

He refused to charge defendant's request #6 (33a, 35a) that a witness can be discredited by inconsistent statements; the reason defendant introduced plaintiff's contradictory versions to the timekeeper and treating physician, Exhibits A and B.

He refused to charge defendant's request #11 (33a, 35a) that an expert's opinion is unreliable unless based on proven facts; the reason defendant elicited that the opinion of plaintiff's medical witness was based on subjective complaints which "could be faked" and a different history than given the treating physician.

He refused to charge defendant's request #19 (33a, 35a-36a) refining the vacuous constructive notice charge (24a) to the specifics of this oil and grease case.

He refused to charge defendant's request #22 (33a, 36a) that defendant had no duty to warn without proof of prior notice, to offset inapposite boilerplate on failure to warn (24a).

He refused to charge defendant's request #30 (33a, 36a) pinpointing perfunctory no insurer's liability (24a), not perfection (27a) charges to the specifics of this oil and grease case.

He refused to charge defendant's request #52 (33a, 36a) concerning plaintiff's duty to mitigate, in light of plaintiff's claim for 11 weeks lost wages and the treating physician's declaration of fitness after 2 months.

Conclusion

The judgment should be reversed for a new trial.

November 12, 1975.

Respectfully submitted,

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